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IN THE

Supreme Court of the United States

October Term, 1957

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC.
and TODD SHIPYARDS CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JACK STEINMAN,
HARRY H. LIPSIG,
on Petition.

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"The Law of Admiralty", Black and Gilmore, published 1957—page 364 10

Supreme Court of the United States

OCTOBER TERM 1957

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gunnleik Berge, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed January 10, 1958 affirming a final judgment entered in the United States District Court for the Southern District of New York on February 25, 1957 on the opinion of Murphy, J., dismissing the complaint.

Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit, which appears on pages 10a through 12a of the record herein, which is made a part of the Appendix to

this petition and printed *infra* at page 13, is not yet officially reported.

The opinion of the District Court, by Murphy, J., deciding various factual issues by agreement of the parties, and then dismissing the complaint, after damages had been assessed by the jury in the amount of $100,000 is reported in 148 Fed. Supp. 608. The opinion appears on pages 4a through 9a of the record herein and is made a part of the Appendix to this petition, and printed *infra* at page 16.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the Provisions of Title 28 U. S. C. A. Section 1254 (1). The judgment of the Court of Appeals affirming the judgment dismissing the complaint, was entered January 10, 1958, the appeal having been argued on November 22, 1957.

Questions Presented

Whether a ship rigger, a business invitee, performing repair services aboard a vessel in navigable waters, who is injured as the result of the unseaworthiness of the vessel, is entitled to recover damages for such injury by invoking the warranty of seaworthiness?

Which classes or types of business invitees aboard vessels, other than seamen and longshoremen, are entitled to the benefits of the warranty of seaworthiness?

Does the opinion of the Court below improperly limit the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and authorities following it, in that it excludes a rigger-repairman from the class of persons entitled to the warranty of seaworthiness?

Statement of the Case

The basis of federal jurisdiction in the District Court is diversity of citizenship between the parties and the required amount in controversy.

At the outset, we point out that the opinion of the District Court explicitly states that most of the facts herein are undisputed (R. 5a, p. 17, *infra*). No questions of fact are raised by the Court of Appeals for the Second Circuit.

The accident herein occurred on October 31, 1952. The vessel, the *SS. "Bulklube"* was in navigable waters at Todd Shipyards in Brooklyn, New York. The shipyard was performing "* * * rather extensive repairs, * * *" (R. 5a, p. 17, *infra*) to the vessel.

Petitioner's specific task on the vessel when injured was the adjustment of a bulkhead into position by means of a manually operated chain-fall and hoist. The equipment being used was owned by the shipyard and had been rigged and secured by petitioner's fellow employees prior to the time petitioner was working with it.

The chain-fall was secured at its highest point to a shackle and the shackle was passed through a padeye, the latter in turn being welded to the underside of the deck below which the bulkhead was to be located.

While petitioner was pulling on the chain-fall, the shackle pin broke, the heavy chain fell, throwing him a distance of some 12 or 15 feet to the deck below, where the chain then landed upon him as he lay. As a result of the occurrence, petitioner sustained serious and permanent injuries.

After the trial, but before the case was submitted to the jury, by agreement of all parties, the case was given to

the jury solely to determine the issue of damages; by the same agreement, the District Court reserved to itself the determination of three factual issues; first whether or not shipowner retained control over the vessel, second, whether or not the shackle pin was defective (i.e., unseaworthy) and third, whether or not, if the pin was defective, this was the proximate cause of the accident.

The jury returned a verdict of $100,000. Motions were thereupon made by both respondents to set the verdict aside as being excessive.

The District Court in resolving the three factual issues reserved to it, decided that the shipowner was not in control of the vessel, at the time of the accident, but recognized that "The issue of control is no longer of much importance since the decision of *Petterson* v. *Alaska SS. Co.*, 205 Fed. (2) 478, (9th Cir. 1953), aff'd. 347 U. S. 396 (1954)" (R. 7a. p. 19, *infra*.)

The District Court further found that the shackle was defective and that this defect was the proximate cause of the accident (R. 7a, p. 19, *infra*).

The District Court recognized and stated that petitioner was entitled to a verdict if he could avail himself of the warranty of seaworthiness (R. 7a, p. 19, *infra*). However, the Court declined and refused to apply the seaworthiness doctrine to petitioner and dismissed the complaint.

In view of this disposition of the issue of liability, the District Court did not reach the question of the excessiveness of the verdict nor the question of indemnity between shipowner and shipyard.

The Court of Appeals for the Second Circuit wrote a brief opinion herein, handed down simultaneously with its opinion in *Halecki* v. *United New York and New*

Jersey Sandy Hook Pilots Association. (Not yet officially reported; the opinion is made a part of the appendix to this petition and is printed *infra* at p. 23.)

The opinion of the Court below in the case at bar stated the issue as follows: "Thus the question is whether the situation was within the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and those decisions that have followed it" (R. 12a, p. 15, *infra*).

The Court below, on the sole basis that the petitioner, a rigger-repairman employed by a shipyard and performing repair work on a vessel in navigable waters, was not engaged in the kind of work that the crew of a vessel was accustomed to perform, concluded that the petitioner was not entitled to a warranty of seaworthiness.

The Court below looked to the case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 and those decisions that have followed it, but failed to apply the doctrine which these authorities pronounce.

Without discussing or even mentioning whether the issue is decided as a matter of law or as a matter of fact, historically or otherwise, the opinion below simply concludes that petitioner was not doing work of a kind the crew was accustomed to perform. The opinion further concludes that, therefore, the petitioner is denied the protection of the warranty of seaworthiness.

In its opinion, by Hand, Circuit Judge, the Court below referred to the *Halecki* case, *supra*. However, in the *Halecki* case, decided by the same Court on the same day, the Court held that a ship-cleaner was entitled to a warranty of seaworthiness. Furthermore, the Court recognized that the element of "control" was not relevant in deciding this issue and also recognized that the fact that the gear which rendered the vessel unseaworthy was not

the ship's but was brought aboard, was likewise of no consequence (App., p. 27, 28, *infra*).

Lumbard, Circuit Judge, concurred in the result in the case at bar. In the *Halecki* case, *supra*, the same judge dissented and said that Berge's work was more the kind of work that the crew of a vessel was accustomed to do than was the work of Halecki (App., p. 38, *infra*).

Indeed, Judge Lumbard suggests that the test used by the Court below to decide whether or not a shipboard worker is entitled to a warranty of seaworthiness, is unsatisfactory.

Moreover, the majority opinion in the *Halecki* case (App., p. 27, *infra*), refers to other law in this area wherein it frankly admits the Court of Appeals for the Second Circuit was wrong. The Halecki opinion goes on to refer to cases where "inconsistent results" were obtained, such for example as *Read* v. *U. S.*, 201 Fed. (2) 758 (3rd Circuit) and *Berryhill* v. *Pacific Far East Line*, 238 Fed. (2) 385 (9th Circuit), cert. den., 354 U. S. 938.

We point out that these inconsistencies exist in different circuits, not to mention here others referred to below which are irreconcilable with decisions of this Honorable Court.

Reasons for Granting the Writ

1. The question presented is important as affecting the rights and liabilities of many people in a far-flung industry which is affected with public interest.

2. The decision below narrows and constricts applicable decisions of this Honorable Court and is probably in conflict with them.

3. The decision below conflicts with decisions in Courts of Appeal of other Circuits and with District Court decisions; and is inconsistent with an earlier decision in the same Circuit.

4. Uniformity is required and necessitates a controlling decision by this Honorable Court.

5. The decision of the Court below is erroneous.

Since the shipping industry is undoubtedly one of the most important industries in this country, as it has always been, and directly involves many people as well as domestic and foreign economic and other factors, it is clearly in the public interest that the rights and liabilities of persons engaged in activities with the shipping business should be fixed and determined.

This Honorable Court has itself often recognized the importance of adjusting relations in this field.

Moreover, since it has been established at least since the decision in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, if not earlier in *Atlantic Transport Co. of West Virginia* v. *Imbrovek*, 234 U. S. 52, that Federal maritime law governs in situations such as the case at bar, uniformity is of maximum significance.

The Court below itself recognizes that uniformity is lacking. It cites no case in this Honorable Court squarely deciding the issue raised. What is perhaps equally important is that in using the simple test for the application of the warranty of seaworthiness—namely whether the petitioner was doing work of a kind the crew was accustomed to perform—the Court below overlooked multifarious other considerations expressed in the *Sieracki* case, *supra*, and other authorities, as the basis for the application of the warranty of seaworthiness.

The Court below ignored the fact of modern specialization of labor and the fact that all shipboard workers risk the same hazards of shipboard service and the fact that all shipboard workers come aboard to perform services at the owner's request and for his benefit and disregarded considerations of social and economic concern which dictate that the risk of harm from unseaworthiness should fall on the shipowner rather than on one injured by unseaworthiness.

Not only does the decision below probably conflict with the decision of this Honorable Court in the *Sieracki* case, *supra*, it also probably conflicts with the decision of this Court, in the *Hawn* case, *supra*, wherein the warranty of seaworthiness was extended to a carpenter, albeit a carpenter doing work in aid of a cargo operation.

The decision below is believed to be in direct conflict with *Read* v. *U. S.*, *supra*, with which the Court below expressly disagreed (R. 12a, p. 15, *infra*).

In the *Read* case, *supra*, the Court of Appeals for the 3rd Circuit held that the warranty extended to a business guest—a repairman—engaged in work consisting of transforming a Liberty type merchant vessel into a troop-carrying transport.

The conflict between the *Read* case and the case at bar is irreconcilable and should be resolved by this Honorable Court.

Decisions in other Circuit and District Courts are also inconsistent with the result herein.

In the case of *Ross* v. *Zealand*, 143 Fed. Supp. 656, a port watchman was held entitled to the warranty of seaworthiness. The decision was affirmed by the Court of Appeals for the Fourth Circuit in 240 Fed. (2) 820 (1957).

Also, in the case of *Imperial Oil Ltd.* v. *Drlik*, 234 Fed. (2) 4, decided by the Court of Appeals for the 6th Circuit in 1956, cert. den. 352 U. S. 941, there is clear dictum that the warranty applies to an employee of a shipbuilding company engaged in repairs and related work.

In *Caudill* v. *Victory Carriers*, 149 Fed. Supp. 11, the Court said at page 15: "The gradual expansion of the doctrine pronounced in Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 AMC 698, wherein the Court held that the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard even though employed by an independent stevedoring contractor whom the owner hired to load or unload the ship, is apparent. Petterson, supra, is a typical example. Ross v. SS. Zealand, 4 Cir. 240 Fed. 2nd 820, affords similar protection to a watchman employed by a Port Service. Carpenters, employed by independent contractors, fall within the same classification as to employment activities aboard ship. *The day may come, if it has not already arrived, when the doctrine of seaworthiness will be extended to all business invitees aboard ship, for Sieracki holds that liability arises as an incident of performing the ship's service with the owner's consent.*" (Italics added.)

Again, in *Meyers* v. *Pittsburg S. S. Co.*, 165 Fed. (2) 642 (6th Cir.) decided in 1948, a drydock worker assigned to a vessel in drydock for reconditioning and repair was injured and sought recovery on the ground of unseaworthiness. The Court found none. However, it said at page 644: "Were we to apply the reasoning of the Sieracki case, it would perhaps be not too difficult to conclude that a drydock company employee engaged in the repair of a ship on navigable waters, with the consent of the ship's

owner, is like the stevedore entitled to all the rights that the maritime law accords a seaman, and historical maritime practice might well disclose that such work was traditionally performed in large measure by seamen."

Again, we refer to the case of *Lester* v. *U. S. A.*, 127 Fed. Supp. 413, 234 Fed. (2) 625 (2nd Cir.—1956), wherein certiorari was granted 352 U. S. 889, and the case thereafter settled (352 U. S. 983).

The case involved an injury to an electrician who, according to the opinion of the Court of Appeals for the 2nd Circuit, was working on a vessel high and dry in a drydock, undergoing a general overhaul.

The Court observed at page 628: "*Although the doctrine of seaworthiness has been extended in recent years to shorebased employees such as libelant, who are injured while working on board a vessel in port,* the measure of liability remains the same as that to seamen at sea: whether the vessel was reasonably fit for the purpose for which she was being used." (Italics added.)

The conflict within the Second Circuit itself, apparent from the decisions in the case at bar and in the *Halecki* case, *supra*, is made all the more apparent by the *Lester* case, *supra*.

Apart from the foregoing judicial authorities, we point out that there is also the opinion of text writers to support the position that the *Hawn* case, *supra*, extends the warranty of seaworthiness to all workers who are exposed to ship-board hazards. See "The Law of Admiralty" Black and Gilmore, published 1957—page 364.

Last, it is submitted that there is much factual and historical data and literature to establish that seamen historically were accustomed to perform repair work comparable with the work of the petitioner herein, assuming

that such consideration is the sole consideration in determining whether the warranty of seaworthiness may be invoked.

No controlling authority has been found which analyzes this factual and historical factor or discusses its relationship to the major question of the extent of the class of business invitees aboard vessels entitled to a warranty of seaworthiness.

Conclusion

A matter of substantial importance, governed by federal law is presented herein.

On the basis of the authorities above set forth, the decision of the Court below appears to be in conflict, not only with other decisions in the same Court, but in conflict with decisions of other District Courts and Courts of Appeal for other Circuits and most important, with decisions of this Honorable Court.

Wherefore, petitioner respectfully prays that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GUNNLEIK BERGE, *Petitioner*

By: FRANK REISS, *Attorney*

Dated, New York, New York,
March, 1958.

JACK STEINMAN,
HARRY H. LIPSIG,
on Petition.

Opinion

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 106—October Term, 1957.

(Argued November 22, 1957 Decided January 10, 1958.)

Docket No. 24673

Gunnleik Berge,

Appellant,

—v.—

National Bulk Carriers Corp. and Todd Shipyards Corp.,

Appellees.

Before:

Hand, Hincks, and Lumbard,

Circuit Judges.

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York, Murphy, *J.*, presiding, dismissing his complaint in an action to recover for personal injuries suffered. Affirmed.

Jack Steinman *for the appellant.*

Victor S. Cichanowicz *for National Bulk Carriers Corp., appellee.*

Patrick E. Gibbons *for Todd Shipyards Corp., appellee.*

Opinion

HAND, *Circuit Judge*:

This is an appeal from a judgment for the defendant entered by Judge Murphy in an action to recover for personal injuries. At the conclusion of the evidence the parties agreed that the only issue to be submitted to the jury was the assessment of damages, the question of defendants' liabilities being reserved for determination of the court. Upon the following facts, Judge Murphy held that the plaintiff who was a rigger employed by the defendant Todd Shipyards had not proved his claim. The ship, Bulklube, was a tanker, owned by the National Bulk Carriers, Inc., which in 1952 decided to reconstruct her and rebuild her in accordance with the standards by the United States Coast Guard and the American Bureau of Shipping as a ship of general carriage. The owner made a contract with Todd Shipyards Corporation to take the vessel to its own shipyard and rebuild her in accordance with approved plans and specifications. This work required removing her decks, burning out partitions and bulkheads which divided her into twenty-three tanks, making new bulkheads and new partitions, putting them in place, renewing the longitudinal and deck beams, reconditioning her engines, boilers, steering gear and all other machinery. As stated in Judge Murphy's opinion, the work amounted "to a virtual rebuilding of the interior of the vessel." The accident happened because while the plaintiff and several other men were working below deck in one of the tanks of the ship, engaged in installing a tank bulkhead in place of the former one, he stood upon a scaffold about 15 feet above the bottom of the tank and was pulling a hoist to raise the new bulkhead into position. During this operation the shackle pin between the hoist and the under-deck "padeye" broke and the chain part of the tackle fell hitting the plaintiff and dis-

lodging him from the scaffold; the shackle pin was afterwards found to be sheare din half, and Judge Murphy held that it was unseaworthy as was obviously true.

Thus the question is whether the situation was within the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and those decisions that have followed it. As we said, *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, handed down herewith, the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. Obviously there must be some limit, else the whole fabrication of a new ship would be included. We can only say that the reconstruction of a ship was not traditionally the task of the crew. *Berryhill* v. *Pacific Far East Line*, 238 Fed. 2d 385 (C. A. 9), cert. den. 354 U. S. 938, is not in conflict with what we believe to be the correct test, and we disagree with *Read* v. *United States*, 201 Fed. 2d 758 (C. A. 3).

Judgment affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur in the result for the reasons set forth in my dissenting opinion in *Anna Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association* filed this day.

(458)

Opinion

UNITED STATES DISTRICT COURT

Southern District of New York

Civ. 96-282.

Gunnleik Berge,

Plaintiff,

against

National Bulk Carriers, Inc. and Todd Shipyards Corp.,

Defendants.

Appearances:

Harry H. Lipsig, Esq., Attorney for Plaintiff, (Klonsky & Steinman, of Counsel).

Frederick H. Cunningham, Esq., Attorney for Defendant National Bulk Carriers, Inc., (Victor S. Cichanowicz, Esq., of Counsel).

Galli & Locker, Esqs., Attorneys for Defendant Todd Shipyards Corp. (Patrick J. McCann, Esq., of Counsel).

Murphy, D. J.

In its final form, this is an action for personal injuries brought against National Bulk Carriers, Inc. on the theory of unseaworthiness only. National Bulk in turn sues Todd Shipyards Corp. alleging that Todd is obliged to indemnify it, should it be held liable to plaintiff.

Opinion

After trial, but before submission to the jury, all the parties agreed that the court should reserve to itself three factual issues, to wit, (1) whether or not defendant National Bulk Carriers retained control over the vessel, the S. S. Bulklube; (2) whether or not the shackle pin was defective, and (3) if yes, whether or not this was the proximate cause of the accident. The case was given to the jury solely on the question (459) of damages. A verdict of $100,000 was returned. After trial motions were made by both defendants to set it aside as being excessive.

The legal issues awaiting decision by the court relate to whether or no the warranty of seaworthiness applies to this plaintiff and whether or no defendant Todd is obligated to indemnify defendant National Bulk Carriers.

Most of the facts were undisputed. National Bulk Carriers, the owner and operator of the tanker S. S. Bulklube, entered into a contract with Todd whereby the latter was to perform certain rather extensive repairs, including renewals of the transverse and longitudinal bulkheads, for a contract price of $981,133. The vessel was delivered to Todd on June 22, 1952, and returned to its owner December 19, 1952. On the date of the accident it was tied up alongside a pier in Todd's shipyard.

By the terms of the contract, the work was to be carried out "under the supervision of and to the satisfaction of representatives of the U. S. Coast Guard, American Bureau of Shipping and Owner." In this connection, the vessel's former chief mate was aboard every day from 8 A.M. to 5 P.M. acting as Assistant Repair Supervisor. Sleeping quarters aboard ship were available for his convenience if he chose to use them. He had not signed articles and was paid a weekly salary the same as defendant's other shoreside employees. National Bulk Carriers'

Port Engineer also came aboard every day, although he had no regular hours. These men gave no orders but inspected the work as it was completed.

The contract also called upon Todd to provide all the necessary labor and material required for the completion of the work, and it is conceded that Todd Supplied the materials involved in the accident, including the shackle pin.

(460) There were no provisions in the specifications pertaining to indemnification. The printed terms on Todd's letterhead contain the following language: "In connection with the accident and/or indemnity and/or insurance clauses, if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligations to take out or maintain insurance beyond the liabilities or the obligations to insure imposed upon us by law." The specifications were accepted subject to the above condition.

On October 31, 1952, the date of the accident, plaintiff was employed as a rigger by Todd. He and several other men were working below deck in one of the tanks of the Bulklube. The specific task involved the installation of a tank bulkhead. Prior to the accident the bulkhead had been removed and renewed by Todd. The installation operation proceeded in the following manner; employees of Todd welded padeyes to the under-deck, attached shackles to them, hung chain hoists from the shackles, brought the bulkhead from the pier and lowered it into the tank, welded padeyes onto the bulkhead, attached the above mentioned chain hoists to the bulkhead, raised it 3" to 4" off the deck and set it against the framework where it was

permanently welded into place, and finally removed the padeyes from the bulkhead and the under-deck. Plaintiff was standing on a scaffold approximately 15 feet above the bottom of the tank, and had just begun pulling on the chain hoist to raise the bulkhead into position when the shackle pin between the chain hoist and the under-deck padeye sheared off and the chain part of the tackle fell hitting the plaintiff who fell from the scaffold to the deck below. Upon inspection after the accident, the shackle pin was found to be sheared in half although it appeared to be bright and shiny.

(461) Upon these undisputed facts I find: (1) that at the time of the accident defendant National Bulk Carriers was not in control of the vessel; (2) that the shackle pin was defective; and (3) that the defective shackle pin was the proximate cause of the accident.

Thus, plaintiff is entitled to a verdict if he can avail himself of the warranty of seaworthiness. The issue of control is no longer of much importance since the decision of *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9th Cir. 1953), *aff'd* 347 U. S. 396 (1954).

Plaintiff relies primarily upon *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); and *Lester* v. *United States*, 234 F. 2d 625 (2nd Cir. 1956), *cert. granted*, 352 U. S. 889 (1956). *Sieracki* was the first of a series of opinions extending the benefits of the warranty of seaworthiness to those other than seamen. Plaintiff in that case was a stevedore employed by an independent contractor, actually engaged in loading the vessel at the time of the accident. The court stated the problem to be "whether the shipowner's obligation of seaworthiness extends to longshoremen *injured while doing the ship's work aboard.*"

At 89 (emphasis added). In this connection the court went on to say that "historically the work of loading or unloading is the work of the ship's service, performed until recent times by members of the crew." At 96. References to traditional ship's service are frequent throughout the opinion and leave little doubt that the warranty of seaworthiness was extended only to those stevedores performing traditional ship's service, and not to longshoremen in general.

In *Pope & Talbot, Inc.* v. *Hawn*, recovery on the basis of unseaworthiness was permitted a carpenter, employed by an independent contractor, who was injured while repairing a "slight defect" in the grain loading equipment (462) during loading operations. But here again the basis for extension of the warranty rested on the type of work done and its relation to the ship. In his concurring opinion Mr. Justice Frankfurter discussed *Sieracki* and concluded that "the decision was based on the fact that longshoremen were doing seamen's work and that therefore they should be ontitled to a seamen's remedy." At 415.

The *Lester Case* involved an electrician employed by the Marine Basin Co. who was injured upon a dry-docked vessel while working on the running light panel. The Court of Appeals reversed the trial judge and denied recovery on the ground that the ship was not unseaworthy. Plaintiff makes much of the fact that the government seems to have conceded in its brief that a warranty of seaworthiness applied. But the issue was never raised and the Court of Appeals never discussed it. Had the court held in libelant's favor there might be some merit in plaintiff's contention that silence implied assent but since the decision was in respondent's favor we feel any inference is unwarranted.

Applying the standards suggested by *Sieracki* and *Pope & Talbot, Inc.* v. *Hawn* to the present case, it is obvious that the nature of Mr. Berge's employment makes his case easily distinguishable from those on which he relied. The cases of *Berryhill* v. *Pacific Far East Lines*, 238 F. 2d 385 (9th Cir. 1956) and *West* v. *United States*, 143 F. Supp. 473 (E. D. Pa. 1956), the facts in which are almost identical to those in the case at bar are more clearly analogous. Both cases in denying recovery stressed, as indeed the Supreme Court did, that the warranty of seaworthiness was extended to workmen other than seamen in the traditional sense of the word, because they were "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, *supra* at 99.

(463) The test then is not the name given to plaintiff's calling or trade but the nature of his work, and viewed in this light it is abundantly clear that plaintiff was not performing usual seamen's work. Granting that seamen have historically been required to perform some repair work both at sea and in port, nevertheless, they have never traditionally been required to remove, renew and reinstall transverse and longitudinal bulkheads—work which amounts to a virtual rebuilding of the interior of the vessel. Since the whole rational of *Sieracki* rests on the premise that a shipowner cannot escape its absolute obligation to provide a seaworthy vessel by contracting to have a third party perform the services traditionally performed by seamen, it becomes apparent that once the third party performs services different from those usually performed by seamen, the warranty of seaworthiness which was historically designed to protect seamen, need no longer apply. *Cessante ratione legis, cessat et ipsa lex.* Consequently the complaint is dismissed.

In view of this determination the question of indemnification and the motions to set aside the verdict as excessive have become moot. No decision is rendered concerning them, and they are dismissed and denied, without prejudice to their being raised again should the need arise.

Judgment accordingly.

THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., February 26, 1957.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

(Argued November 21, 1957 Decided January 10, 1958.)

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor

of the plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY *for the appellants.*
NATHAN BAKER *for the appellee.*

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the

ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes."

The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.[1] The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,[2] but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his

[1] *United States* v. *Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker* v. *Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge* v. *Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

[2] *Leathers* v. *Blessing*, 105 U. S. 626, 630.

activities."[3] Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Juite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,[4] rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel within the navigable waters of New Jersey. In *Guerrini* v. *United States*, 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot* v. *Hawn*, 346 U. S. 406 or *Petterson* v. *Alaska SS. Co.*, 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the

[3] Restatement of Torts, Vol. II, §344, Comment b.

[4] "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read* v. *United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge* v. *National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contribu-

tory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren* v. *United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey[5] which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard* v. *The Tungus*, December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham* v. *Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was

[5] N. J. S. A. 2A:31-1.

no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: i.e., whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot* v. *Hawn, supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, no matter where suit upon it was brought.[6] In *Pope & Talbot* v. *Hawn, supra*, however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.[7] The following language

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[6] *Robinson* v. *Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette* v. *Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien* v. *Luckenbach S.S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham* v. *A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee*, 300 F. 93 (S. D. N. Y. 1924).

[7] Cf. *Garrett* v. *Moore-McCormick Co.*, 317 U. S. 239.

we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary* v. *United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with Pope & Talbot v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis* v. *Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary* v. *United States Lines Company*, *supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and

inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they

brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion,

both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.[1] From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the ac-

[1] See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, The Law of Admiralty, 315-324, 358 (1957).

tivities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a danerous and unusual nature that it is beyond the com-

petence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the granting wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki*, *Hawn* and *Petterson*[1] cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are en-

[1] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

titled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge* v. *National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence.

There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis* v. *Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis* v. *Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), aff'd 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their

failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and fifty-eight.

Present: HON. LEARNED HAND
HON. CARROLL C. HINCKS
HON. J. EDWARD LUMBARD
Circuit Judges.

GUNNLEIK BERGE,
Plaintiff-Appellant,

v.

NATIONAL BULK CARRIERS, INC., and TODD SHIPYARDS CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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Supreme Court of the United States

October Term, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORPORATION,

Respondents.

Brief of Respondent, National Bulk Carriers, Inc., in Opposition to the Petition of Gunnleik Berge for a Writ of Certiorari

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 392

GUSTAVUS ESSER,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORPORATION,

Respondents.

Brief of Respondent, National Bulk Carriers, Inc.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 148 F. Supp. 406. The opinion of the Court of Appeals for the Second Circuit, affirming the District Court, is reported at 251 F. 2d 717.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However, the petition fails to specify any important reasons why in this case, under the existing facts, a writ should be granted here, nor does it indicate that any genuine ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists in this case.

Counterstatement of the Case

It is necessary to point out at the outset that the questions as framed by the petitioner and the facts related by him do not contain the matter which is material to a determination as to whether or not this case is properly the subject for the granting of a writ. Therefore, the petitioner's statements and arguments do not furnish a reliable guide to the proceedings below. In the petition, an attempt is made to make it appear that the facts of this case are not substantially different than those in the cases referred to in the petition, and that, therefore, the holdings of the courts below are in conflict therewith. There, however, is a clear line of demarcation between the subject case and those cases, and the result arrived at in the subject case is in perfect conformity with the statement of this Court in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, that the question of when seamen's rights should be enforced "depends largely on the facts of the particular case and the activity in which they were engaged at the time of injury."

Firstly, under the undisputed facts, at the time of the petitioner's accident, the *SS Bulklube* could not be subject to the warranty of seaworthiness. On June 22, 1952, after the crew had been paid off and the vessel stripped of its gear and equipment, it was delivered into the custody of respondent Todd Shipyards Corporation for the purpose of being reconstructed and rebuilt by Todd Shipyards in accordance with standards laid down by the United States Coast Guard and the American Bureau of Shipping. The work to be done was pursuant to a written contract which required Todd Shipyards to provide all the necessary labor and material which was needed for the completion of the work. Among other things, this reconstruction job required the removal of the vessel's decks, the burning

out of the partitions and bulkheads which divided the vessel into 23 tank compartments, the fabricating of new bulkheads and partitions, renewing the longitudinal and deck beams, reconditioning the engines, boilers, steering gear and all other machinery. As stated in Judge Murphy's opinion, the work amounted "to a virtual rebuilding of the interior of the vessel." The petitioner's accident occurred during this rebuilding as he and several other employees of Todd Shipyards Corporation were below deck installing a new tank bulkhead in a place where one had formerly been and which had been previously removed by shipyard workers. The *SS Bulklube* remained in the shipyard's custody during this entire rebuilding period and was not redelivered to the owner until December 18, 1952. Thus, what the petitioner was working on at the time had no connection with commerce or navigation and, for that matter, might never again engage in commerce or navigation. It necessarily had been withdrawn from navigation for a long period.

Secondly, the work which petitioner was engaged in at the time of the occurrence of his accident was not work traditionally and historically performed by members of the crew of a vessel but was of a nature which could be performed only exclusively by shore based personnel.

Petitioner's duties as a rigger in the employ of Todd Shipyards Corporation required him to work on any vessel which was in his employer's yard. On the date of his accident he was called upon to help adjust a steel bulkhead, which was about 20 feet high, 40 feet long and about 1 inch thick, by means of a manually operated chain hoist so that it would set against the framework where it could be permanently welded into place. This bulkhead had been previously fabricated ashore at Todd's shop and had required the use of Todd's shore crane to place it on board the vessel. Prior to being welded into position, it had been

transferred from the shore crane by Todd's employees onto three chain hoists which Todd had selected from its own supply for this purpose and had suspended from padeyes which Todd's welders had temporarily welded onto the underside of the deck above the place where the bulkhead was to be located. These padeyes were removed by Todd's employees from the underdeck when the bulkheads were welded into position and before the vessel was returned to its owner.

It was while the petitioner and a co-worker were pulling on one of the three chain hoists which Todd had furnished for the purpose of temporarily suspending the 20 x 40 foot steel bulkhead, that the pin in a shackle with which the chain hoist on which the petitioner was pulling was attached to the padeye broke and caused the accident to occur. Petitioner was thus doing work which could be done only by shore based personnel on a deactivated vessel.

Finally, the warranty of seaworthiness sought to be imposed here is not that arising from the condition of the vessel, its equipment or appliances or equipment which is required for the performance of the ship's work, but instead from equipment owned by a shipyard, furnished by a shipyard and required exclusively for the performance of shipyard work.

There is no dispute that the chain hoist, the shackle and the pin which broke and the padeye which was temporarily welded to the underdeck were all owned by Todd Shipyards, and were selected and furnished by Todd Shipyards exclusively for shipyard work. They never became part of the vessel and had to be removed before the ship's work could be performed. The ship had no need for it and, for that matter, in all probability never knew it existed. There is no basis in reason or logic for extending seaworthiness to comprehend appliances which a ship does not need and

which could not be on board except if the vessel is not engaged in ship's business.

Initially, the petitioner sued both National Bulk Carriers, Inc., the owner of the vessel, and Todd Shipyards Corporation, his employer. On the trial, petitioner discontinued the action against his employer because his remedy against Todd Shipyards was under the Longshoremen's and Harbor Workers' Compensation Act. Todd, however, remained in the action on the basis of a cross-complaint which National Bulk Carriers, Inc. had filed against it, seeking full indemnity. The suit thereafter proceeded against National Bulk solely on the ground of whether the shipowner's warranty of seaworthiness was to be extended to shipyard employees engaged exclusively in shipyard work.

On the trial, by agreement, the only question submitted to the jury was the quantum of damages. All other issues, both fact and law, were left for determination by the trial court. In accordance therewith the District Court found that under the circumstances of this case, no legal or factual basis existed for the application of the warranty of seaworthiness to the petitioner.

By applying the standards suggested by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, the District Court found that the nature of petitioner's employment clearly distinguished his case from those in which the warranty of seaworthiness had been applied to non-members of a ship's crew. It emphasized the fact that it found that petitioner was engaged in rebuilding a vessel and not in such repair work as members of the crew have historically been required to perform both at sea and in port. Since the work of rebuilding a ship was not traditionally seaman's work, the premise on which the whole rationale of

the *Sieracki* case, *supra*, rested precluded the application of the warranty of seaworthiness to this case. This Court in laying down the doctrine of the *Sieracki* case made it clear that the warranty was designed to extend only to those services which a ship's crew traditionally performed and which [illegible] ought to have done with the advantages of more modern divisions of labor and none other.

In affirming, the Court of Appeals pointed out that on the facts the District Court had found that the petitioner had failed to prove his claim. Accordingly, it affirmed and held that because the reconstruction work in which petitioner was engaged was not traditionally the task of the crew, he could not invoke the warranty of seaworthiness.

In *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, 251 F. 2d 706, which was handed down simultaneously with the decision in this case, the majority emphasized the clear line of demarcation which existed between this case and the *Halecki* case, *supra*. In distinguishing the *Halecki* case from this case, it said at page 712:

> "* * *, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul."

The dissenting opinion of Judge Lumbard went even further. Judge Lumbard expressed the opinion that the holding of the majority in the *Halecki* case, *supra*, was based on a play on words and that there was no more reason for extending the warranty to Halecki than there was to the petitioner if the reasoning of the majority were carried to its illogical extreme. Judge Lumbard's expression of

dissatisfaction with the test to be applied is not directed to that laid down by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, but to the manner in which this test was misapplied by the majority in the *Halecki* case, *supra*.

The decision of the court below in this case is, therefore, not inconsistent with the standards laid down by this Court in the *Sieracki* and *Hawn* cases, but perfectly in harmony therewith. The inconsistency which may exist between the *Halecki* case and this Court's holdings is not a valid basis for the granting of a writ in this case.

Questions Presented

Under all the material facts of the case, the actual questions are as follows:

(1) Whether an employee of a shipyard working on board a deactivated vessel, which is in the custody and control of the employee's shipyard employer for the purpose of being rebuilt, can invoke the warranty of seaworthiness against the owner of the deactivated vessel for injuries brought about by the breaking of gear belonging to the shipyard, which is brought aboard by the shipyard for the sole purpose of carrying out the rebuilding work, and which is removed from the vessel on the completion of the work.

(2) Whether the work of rebuilding a vessel, which involves structural repairs, is work that was historically and traditionally done by members of the crew of a vessel.

(3) Whether a vessel which is in the custody of a shipyard and is undergoing repairs which virtually amount to a rebuilding of the interior of the vessel is subject to the warranty of seaworthiness.

Argument

(1) Petitioner's contention that the warranty of seaworthiness applies to him while he is engaged in rebuilding a vessel, which because of the nature of the work to be performed must, of necessity, be delivered into the custody of the shipyard employer and be withdrawn from navigation, is clearly unsound and contrary to the long-established principles of applicable law. Petitioner's allusions to the work being done on board as repair work are contrary to the undisputed facts and could be misleading. While it may be true that the concept of control does not, in all instances, affect the nature of the shipowner's obligation, *Petterson* v. *Alaska S.S. Co.*, 347 U. S. 396; *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. denied 354 U. S. 938, it nonetheless serves to emphasize the line of demarcation which exists between traditional ship's work and non-ship's work and places this case beyond the class of cases to which this Court has held that the shipowner's obligations under the maritime law apply.

In *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, this Court has reiterated the principle that even a seaman who is engaged in work on a vessel out of navigation, which work customarily would be exclusively done by shore based personnel, cannot recover against his shipowner employer under the Jones Act (46 U. S. C. A. 688, *et seq.*). In arriving at the conclusion that seaman's rights could not be involved, it gave particular emphasis to the status of the vessel at the time in question. In this connection, it said at page 191:

> "* * *. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death."

While it is true that at the time of the death of the decedent in the *Desper* case, *supra*, the vessels on which he was working were not afloat, this is not a material factor when a vessel is out of navigation. See *Hawn* v. *America S.S. Co.*, 107 F. 2d 999, 1000 (2 Cir.); *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779, 780 (2 Cir.), and *Antus* v. *Interocean S.S. Co.*, 108 F. 2d 185, 187 (6 Cir.), cited with approval by this Court in the *Desper* case, *supra*. Thus, since under the established law, no right to recover damages against the shipowner employer would exist in favor of a seaman working on a vessel out of navigation, it would not be consistent to give a right to the petitioner which a seaman could not invoke under similar circumstances.

(2) Petitioner's contention that a writ should be granted because of the importance of the shipping industry in this country and because it involves many people and, therefore, it is in the public interest that the rights and liabilities of persons engaged in activities with the shipping business should be fixed and determined is misleading and misdirected. It would seem that it would be more in the public interest to place the liabilities where the actual fault lies and that this Court should not be resorted to in an attempt to circumvent a legislative policy and give a right of recovery where the legislature has already acted. Petitioner's contentions are fully answered by the Court of Appeals (9 Cir.) in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. denied 349 U. S. 938. It was there said at pages 387-388:

> "The appellant has his statutory remedy against his employer. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq. He has his common law remedy as a business invitee against the shipowner, if he can

prove the latter's negligence. In view of such rights and protection, he does not need, nor should he ask, for the further extension of a doctrine already stretched. If there exists a social need for such an extension (which we doubt in view of existing remedies), it is a matter for Congressional enactment, and not for this Court to bring about, thru judicial legislation.' Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 286, 72 S. Ct. 277, 96 L. Ed. 318."

The petitioner here also has a remedy under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901 *et seq.*). His rights and liabilities have already been fixed and determined by the legislature. A writ should, therefore, not be granted for the purpose of having this Court pass on whether the legislative policy was wise or not, nor should this Court be asked to circumvent the legislative will and create a theory of liability which would allow the petitioner to by-pass the rights which the legislature deemed fit to fix. *De Zon v. American President Lines* (1943), 318 U. S. 660, 672.

If the rights which the legislature fixed are inadequate, the proper recourse is Congressional action and not resort to this Court. *Lauritzen v. Larsen* (1953), 345 U. S. 571, 593.

(3) Petitioner's contention that the decision below narrows and constricts applicable decisions of this Court, that it is probably in conflict with them, and that it conflicts with decisions of the Courts of Appeals of other circuits and with the District Court decisions, as well as its own earlier decision, is equally untenable.

The decision below is squarely within the holdings by this Honorable Court in *Seas Shipping Co. v. Sieracki*,

supra, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*. When petitioner urges that the court below cited no case in this Honorable Court squarely deciding the issue raised, he overlooks the clear mandate of this Court that the warranty of seaworthiness was not intended to extend beyond work traditionally done by the ship's crew. There is no need for the granting of a writ in this case. The uniformity which the petitioner urges here can be achieved by a denial of the writ and not by the granting of it.

Furthermore, there is no actual conflict between the decision below and decisions in other circuits and district courts where the issue as to whether the warranty of seaworthiness should apply or not was raised and considered.

The case of *Ross* v. *SS Zeeland*, 240 F. 2d 820, presents no conflict as it concerns a port watchman who was performing watching services on board a vessel at the time it was unloading cargo. The issue of whether the warranty of seaworthiness applied to him or not does not appear to have been raised, but whether it was or not, seamen have, from time immemorial, stood watch on board while a vessel is in port discharging and the warranty would have to be applied because he was doing seamen's work.

Imperial Oil Ltd. v. *Drlik*, 6 Cir. (1956), 234 F. 2d 4, cert. denied 352 U. S. 941 creates no conflict either. The claimant there was injured while acting as a member of a dock crew and was engaged in the undocking of a vessel. In the words of the Appellate Court, he was "doing a seaman's work and incurring a seaman's hazards." There is no dictum in this case, as petitioner asserts, which states that the warranty applies to an employee of a shipbuilding company engaged in repairs and related work. In fact, if it did, it would be contrary to this Court's holding in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 413, where it was emphatically stated that the protection was not based

on the name used to describe the job the injured held, but on the type of work being done and its relationship to the ship and to the historic doctrine of seaworthiness.

Caudill v. *Victory Carriers*, 149 F. Supp. 11, also creates no inconsistency. In that case, an Army corporal who was engaged in the duties of a longshoreman was permitted to invoke the warranty of seaworthiness on the ground that he was entitled to the protection accorded those doing traditionally seaman's work in accordance with the holding of this Court in the *Sieracki* case, *supra*.

The cases of *Read* v. *U. S.*, 201 F. 2d 756 (3 Cir.), and *Lester* v. *U. S.*, 127 F. Supp. 413, 234 F. 2d 625, cert. granted 352 U. S. 869, and dismissed per stipulation pursuant to Rule 60 of the Rules of this Court, 353 U. S. 963, furnish no valid precedents of a conflict with the decision below. As the District Court pointed out in its opinion, 146 F. Supp. 606, the issue of whether the warranty of seaworthiness applied or not was never raised in the *Lester* case, *supra*, and the Appellate Court never discussed it. This is what also appears to have occurred in the *Read* case, *supra*. This Court has unequivocally rejected such cases as precedents for anything. In *Webster* v. *Fall*, 266 U. S. 507, it said at page 511:

> "* * * We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. * * *"

The purported conflict between *Meyers* v. *Pittsburg S.S. Co.*, 165 F. 2d 642 (6 Cir.), and the decision below is no conflict at all. They are in fact in perfect harmony. In the *Meyers* case, *supra*, the court stated that it would refuse to apply the warranty of seaworthiness, even if there was evidence supporting it, to a shipyard worker who was injured on a drydock in connection with certain reconditioning and repair work which was being done on board a vessel. Thus, the purported conflict in decisions does not exist.

On the other hand, there is complete unanimity between the decision below and the decisions of this Court as well as those of other courts where the issue of whether or not the warranty of seaworthiness should apply to shipyard workers doing exclusively shipyard work has been raised and considered. See *Berryhill* v. *Pacific Far East Line*, 9 Cir., 238 F. 2d 385, cert. denied 349 U. S. 938, and *Raidy* v. *United States*, 4 Cir. (1958), 252 F. 2d 117.

CONCLUSION

The decision of the Court below is correct. The petition fails to present any important reason for granting the writ. No substantial question is raised. There is no conflict of decisions. Petitioner's remedy, if any, is legislative and not properly directed to this Court.

The petitioner's complaint was properly dismissed and it is respectfully submitted that this Court should deny the petition.

Respectfully submitted,

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On Brief.

SUPREME COURT U. S.

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FILED
APR 30 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 808

GUNNLEIK BERGE,

Petitioner,

against

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORP., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

against

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

BRIEF OF RESPONDENT, TODD SHIPYARDS CORP., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Question Presented

1. Whether the obligation of seaworthiness, traditionally owed by an owner of a ship to a seaman, extends to a workman injured aboard ship while engaged in doing work which is of a type neither traditionally nor customarily done by seamen or by members of the vessel's crew.

Statement

The plaintiff, a rigger employed by the defendant, Todd Shipyards, was injured on October 31, 1952, aboard the *S.S. Bulklube,* when a shackle, to which the chain of a hand hoist was attached, broke, causing the chain to strike him and throw him to the deck. He brought this action against the shipowner and against his employer to recover

damages for his injuries. The shipowner served a cross-complaint on the employer, alleging a right to indemnity in the event of a recovery by the plaintiff.

The action against his employer was discontinued because his exclusive right against his employer was under the Longshoremen's and Harbor Workers' Act. The remaining issues were tried before Judge Murphy and a jury. At the close of the case it was agreed that the issue of damage only be submitted to the jury and that all other issues of fact and law be reserved to the court for determination.

The jury assessed the damages at $100,000.00. The court denied the motion to set aside the verdict without prejudice to its being raised again, if necessary.

On the reserved issues the court found as a fact that the defendant, National Bulk Carriers, the owner of the vessel, was not in control of the vessel when the accident happened; that the shackle pin which broke was defective; and that the defective shackle pin was the proximate cause of the accident. The court concluded as a matter of law that the plaintiff, because of the nature of the work in which he was engaged, was not entitled to the benefit of the shipowner's warranty of seaworthiness, and dismissed the complaint.

The plaintiff appealed to the Court of Appeals for the Second Circuit, which unanimously affirmed the decision of the court below. The opinions of the Court of Appeals and of the Trial Court are printed in the appendix to petitioner's brief.

The material facts in the case have been summarized in the opinion of Judge Murphy, and are not in dispute. The defendant National Bulk Carriers, the owner of the tanker *S.S. Bulklube*, contracted with Todd Shipyards Corp. to do extensive repairs on the vessel, including cutting through the decks and installing new bulkheads, a virtual rebuild-

ing of the interior of the ship. The extent of the repairs is reflected in the contract price of $981,133.00.

The vessel was given to Todd on June 22, 1952, and was not returned to its owner until December 19, 1952. During all that time it was a dead ship, without a crew. The only contact its owners had with it during that time was through a right to inspect to determine whether the structural changes being made conformed to the contract specifications.

The vessel was moved from dry dock to the water as the exigencies of the work demanded. On the day of the accident, it was in the water at the shipyard, adjacent to the machine shops, where Todd's employees were installing tank bulkheads. A crane on the pier lifted the steel bulkhead from the pier and lowered it into the tank. In order to set it into its permanent position in the tank it was necessary to raise it three or four inches from the floor. To do this Todd's employees used a hand hoist, the chain of which was attached to the underside of the deck above by means of a shackle run through a padeye welded by Todd's employees to the underside of the deck. While the plaintiff was pulling on the chain to lift the bulkhead, the pin of the shackle broke, causing the chain to fall and injure him.

The legal problem which the Trial Court and the Court of Appeals were called upon to resolve was whether the owner's absolute duty to provide a seaworthy vessel, together with seaworthy appliances and equipment, extended to this worker who was engaged in making major structural repairs on a vessel not in navigation, work neither historically nor traditionally done by seamen. The conclusion of the Trial Court and of the Court of Appeals was that there is no basis in law or in logic for extending the scope of that duty to such work, and it is respectfully submitted that the conclusion was correct. It conforms to the law as enunciated in decisions of this Court and ex-

presses the almost unanimous view of the problem taken by the judges in the several Circuits. There are no special or important reasons for granting a writ of certiorari, or which call for the exercise of this Court's power of supervision.

Argument

1. THE WARRANTY OF SEAWORTHINESS, AS DEFINED AND LIMITED BY EXISTING LAW, IS AVAILABLE TO SEAMEN AND TO OTHERS WHO, THOUGH NOT EMPLOYED BY THE SHIPOWNER, DO WORK IN THE SERVICE OF THE SHIP OF A KIND THAT WAS FORMERLY AND TRADITIONALLY DONE BY SEAMEN. NO SOUND REASONS EXIST FOR EXTENDING IT, AS THE PLAINTIFF HERE CONTENDS IT SHOULD BE EXTENDED, TO ALL BUSINESS INVITEES ON SHIPS, OR TO WORKMEN WHO PERFORM TASKS ON SHIPS WHICH SEAMEN NEVER DID PERFORM AND WERE NOT EQUIPPED TO PERFORM.

The existence of an absolute and non-delegable obligation on the part of a shipowner to provide for his crew a seaworthy ship, with seaworthy appliances, in addition to his absolute obligation to provide maintenance and cure for sick or injured members of his crew, was first recognized by this court in its decision in *The Osceola*, 189 U. S. 158, 175. Originally embracing only seamen and mariners employed directly by the shipowner, the special protections afforded to seamen because of the hazardous nature of their employment were gradually extended by the Admiralty Courts to other workers who, though not under contract of employment to the shipowner, occupied the status of seamen because they did the type of work which normally and traditionally was done by seamen.

The reasons prompting the extension are given in the opinion of Mr. Justice Holmes in his opinion in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But

words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by ship's crew. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62, 58 L. Ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the costs of the business. If they should be protected in the one case, they should be in the other."

The protection given to seamen by the Jones Act was extended to stevedores by the decision in *International Stevedoring Co.* v. *Haverty, supra;* the protection of the warranty of seaworthiness, enjoyed by seamen under the general Admiralty Law, was extended to stevedores by this court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. And later cases have held that the warranty of seaworthiness inures to the benefit, not only of stevedores, but of all workmen who occupy the status of seamen and incur the seamen's risks and do the seamen's work. (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Torres* v. *The Kastor*, 227 F. 2d 664.)

The reasons for the extension were alike in both instances. Admiralty will not deny its protection to workers merely because they are not classified as seamen, if their status is in effect the status of seamen and they do the work which seamen formerly did. It is the nature of the work, not the title of the employee, which determines whether an employee is entitled to the protection of the warranty of seaworthiness.

The opinion in *Seas Shipping Co.* v. *Sieracki, supra,* clearly enunciates the reasons which prompted the court to extend the scope of the warranty of seaworthiness:

"On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employees whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. * * * Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. * * * That the owner seeks to have it done with the advantages of more modern devisions of labor does not minimize the worker's hazard and should not nullify his protection."

The same reasons were further emphasized in the opinion in *Pope & Talbot, Inc.* v. *Hawn, supra*:

"Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

The logic which supports the extension of the protection of the warranty of seaworthiness to those who do the work of seamen in the service of the ship compels the rejection of any attempt to extend it further to workmen whose work is of a kind never done by seamen. The courts have long recognized this and have uniformly confined the protections, originally afforded only to seamen, to those workers who, though not called seamen, occupy the status, and do the work, of seamen. In *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, the opinion states the position taken by the courts in cases where efforts were made to enforce such an extension:

> "The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. The work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a 'seaman'. The boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of a kind that, in the case of larger vessels, would customarily be done by exclusively shore based personnel. • • • It is our conclusion that while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act."

Attempts to have the doctrine of seaworthiness similarly extended were also rejected. (*Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385; *West* v. *United States*, 143 F. Supp. 473; *Raidy* v. *United States of America*, 153 F. Supp. 777.) In each of these cases the court refused to extend the doctrine of seaworthiness to a worker on a vessel which was laid up for major structural repairs, and where the work he was doing was not work usually done by seamen but work that was the normal function of shipwrights and shipyard workers. Traditionally, seamen were employed aboard

the ship, during the voyage, to aid in the navigation and preservation of the ship, and to promote the purposes of the voyage. Everything necessary and incidental to those functions was performed by the seamen, including running repairs and loading and unloading. What was not included was building the ship or making major structural repairs on the ship. Traditionally, those were functions of the shipwright and the shipyard worker. Those workmen have their own protections within their own industries, and no compelling reasons exist to extend to them protections which have their origin in the peculiarly hazardous and exacting occupation of the seaman and his peculiar relation to the ship itself.

CONCLUSION

Since the principle of law underlying the decision in this case is well established and uniformly recognized throughout the country, and since the only difficulty that may exist is difficulty in its application to any particular set of facts, a difficulty inherent in the application of all principles of law, there is nothing here which calls for the exercise of this court's power of supervision. The petition for the writ of certiorari should, therefore, be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC.
and TODD SHIPYARDS CORP.,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION

FRANK REISS,
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JACK STEINMAN,
HARRY H. LIPSIG,
on Petition.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

Motion for Leave to File Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Petitioner Gunnleik Berge respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on May 19, 1958.

Rehearing is sought at this time because, as is more fully discussed in the annexed petition, a decision was entered shortly thereafter, and on June 9, 1958, in the case of *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, granting a petition for writ of certiorari. This latter case involves the same question as that presented herein.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds

upon which it is based arose after the entry of the order herein; and this Honorable Court has the power, in its discretion to entertain the petition. *Roberts Sash & Door Co.* v. *U. S.*, 282 U. S. 829; *Duquesne Steel Foundry Co.* v. *Burnet*, 282 U. S. 830; *Douglas* v. *Willcuts*, 295 U. S. 722; *Silesian American Corp.* v. *Clark*, 332 U. S. 469; see also *U. S.* v. *Ohio Power Co.*, 353 U. S. 98.

FRANK REISS
Counsel for Petitioner

Dated: New York, N. Y.
June 26, 1958.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORP.,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner GUNNLEIK BERGE prays that this Court grant rehearing of its order of May 19, 1958, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition originally filed herein.

Reasons for Granting Rehearing and Issuing the Writ

At the time the petition herein was filed, and indeed at the present time, there does not appear to be any controlling decision of this Honorable Court explicitly deciding the legal issues presented in the case at bar, involving the scope of the warranty of seaworthiness,

particularly as to the classes of persons entitled to invoke that doctrine.

The instant case was decided on January 10th, 1958 by the United States Court of Appeals for the Second Circuit on the very same day as the same Court decided the case of *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, which latter case bears number 955 of the October 1957 term of this Honorable Court.

The fact that both cases involve the same question of law is evident not only from the fact that the decisions of the Court of Appeals for the Second Circuit were handed down simultaneously, but also from the fact that the opinion in each case refers to the opinion in the other and affects the other.

Petitions for writ of certiorari were filed in both cases. The petition for writ of certiorari herein was denied on May 19, 1958; the petition in the *Halecki* case, *supra*, was granted on June 9, 1958.

The importance of the question presented continues to be as great and to affect as many significant interests as when the petition herein was originally filed.

Although the within petition is not filed within the time prescribed by the applicable rules of this Honorable Court, it is apparent from the foregoing that the within petition is based upon circumstances of substantial effect which occurred after the petition was originally filed. This circumstance was directly adverted to by this Honorable Court in the case of the *U. S.* v. *Ohio Power Co.*, 353 U. S. 98 where the Court said at page 99:

> "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules".

The importance of consistent disposition of cases involving the same question and the need for uniformity in the application of the principles recognized by this Honorable Court, indicate that this petition for rehearing should be granted to insure that no conflict should arise, particularly between cases decided within so short a time of each other. See *U. S.* v. *Ohio Power Co.*, 353 U. S. 98, *supra.*

CONCLUSION

For the reasons above set forth and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Dated, N. Y., N. Y.,
June 1958

Respectfully submitted,

FRANK REISS,
Counsel for Petitioner.

JACK STEINMAN,
HARRY H. LIPSIG,
On Petition.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 and the applicable rules of this Court.

FRANK REISS,
Counsel for Petitioner.